UNITED STATES GOVERNMENT BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 29

WILLETS POINT ASPHALT COR	PORATION)	
and	Employer)	
NESTOR SECAIRA, AN INDIVID	UAL)	Case No. 29-RD-1124
	Petitioner)	
and)	
LOCAL 175, UNITED PLANT AND PRODUCTION WORKERS	D)	
	Union)	

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

This report contains my findings and recommendations regarding the Union's objection in Willets Point Asphalt Corporation, 29-RD-1124. For the reasons contained herein, I recommend overruling the Union's objection.

Procedural History

Upon a petition filed on December 15, 2008,¹ by Nestor Secaira, an Individual, herein called the Petitioner, upon which Local 175, United Plant and Production Workers, herein called Local 175 or Union, intervened based on its collective bargaining relationship with Willets Point

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All dates hereinafter are 2008, unless otherwise indicated.

Asphalt Corporation, herein called the Employer, and pursuant to a Decision and Direction of Election issued by the Regional Director on December 29, an election by secret ballot was conducted on January 23, 2009, among the employees employed in the following unit:

All full-time and regular part-time asphalt plant workers, including laborers, mixers, burners, maintenance employees, maintenance helpers and asphalt strippers employed by the Employer at its facility located at 32-02 College Point Boulevard, Flushing, New York, but excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

The Tally of Ballots made available to the parties pursuant to the Board's Rules and Regulations, showed the following results:

Approximate number of eligible voters	8
Number of void ballots	0
Number of ballots cast for the Union	1
Number of votes cast against	
participating labor organization	5
Number of valid votes counted	6
Number of challenged ballots	1
Number of valid votes counted plus challenged ballots	7

Challenges are not sufficient in number to affect the results of the election. A majority of the valid votes counted plus challenged ballots has not been cast for the Union.

The Union filed a timely objection to conduct affecting the results of the election. Specifically, the Union alleged that the Employer provided the Union with an inadequate Excelsior² list prior to the election. The Excelsior list provided by the Employer contained eight names. The Union asserts that five names were omitted from this list. Pursuant to Section 102.69 of the Board's Rules and Regulations, the Regional Director caused an investigation to be

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² Excelsior Underwear, 156 NLRB 1236 (1966).

conducted and on February 10, 2009, issued and served on the parties a Supplemental Decision on Objections and Notice of Hearing, in which he directed that a hearing be held by a duly designated Hearing Officer regarding the Union's objection.

A hearing was held before the undersigned on February 26 and March 2, 2009 in Brooklyn, New York. The Employer, the Petitioner, and the Union appeared at this hearing.

At the hearing, the Employer and the Union were represented by counsel and all parties were afforded full opportunity to participate, be heard, examine and cross-examine witnesses, present evidence pertinent to the issues, and present oral argument.

In accordance with the Notice of Hearing, and upon the entire record of this case, consisting of the transcript of the hearing and exhibits, including my observation of the demeanor of the witnesses who testified, and the specificity of their testimony, the undersigned issues this Report and Recommendations with respect to the Union's objection.³

The Witnesses

The Union called the Petitioner, Nestor Secaira, and Fred Clemenza, a Union organizer.

The Employer called Kenneth Tully, the owner of Willets Point. Ray Ortiz and Phillippe Garcia appeared at the request of the Hearing Officer.

The Objection

A. The **Excelsior** Requirement

The Union alleges that the Employer omitted the names of five voters, specifically Ray Ortiz, Phillippe Garcia, Chris, Wakeen, and Domingo, from the Excelsion list. The Employer and the Petitioner assert that the objection lacks merit.

References to the transcript are identified as Tr. __. References to the Board, Employer, and Union's exhibits will be cited as Bd. Ex. __, Er. Ex. __, and U. Ex. __ respectively.

Excelsior Underwear, 156 NLRB 1236 (1966), requires employers to provide a list of eligible employees, including employees' complete names and addresses, prior to the election. See also North Macon Health Care Facility, 315 NLRB 359 (1994). Generally, the Board has held that while the requirements of Excelsior should not be applied mechanically, substantial compliance with those requirements is necessary. See Thrifty Auto Parts Inc., 295 NLRB 1118 (1989). An Excelsior list that omits the names and addresses of a significant number of voters does not constitute substantial compliance. In Thrifty, the Board set aside an election because the employer had omitted the names of 2 voters out of 21 eligible voters, or 9.5 percent of the eligible voters. The Board found that this was not sufficient compliance with Excelsior, observing that the Board "presumes that an employer's failure to supply a substantially complete eligibility list has a prejudicial effect on the election." Id. at 1118; see also Chemical Technology, 214 NLRB 590 ftnt. 3 (1974) (finding that an omission rate of 8.3 percent was not sufficient compliance with Excelsior). Even in an decertification case as this one, where the union presumably has other sources of employees' information, a union is entitled to a complete and timely Excelsior list. See Alcohol and Drug Dependency Services, 326 NLRB 519, 520 ftnt. 8 (1998) ("The Excelsior requirement applies to all elections, and a union's ability or inability to obtain the Excelsior information through alternative means in no way affects or substitutes for the <u>Excelsior</u> requirements.").

Factors other than the percentage of omissions from an <u>Excelsior</u> list may be relevant in <u>Excelsior</u> cases. In <u>Woodman's Food Markets Inc.</u>, 332 NLRB 503 (2000), the Board stated that an approach which "focuses solely on the percentage of omissions relative to the number of employees in the unit fails to adequately effectuate the purposes of the <u>Excelsior</u> rule." Woodman's, 332 NLRB at 504. In this regard, the Board will consider factors such as "whether

the number of omissions is determinative . . . and the employer's explanation for the omissions." Id.

B. The Eligibility of the Five Individuals

1. Background

The Employer operates an asphalt plant. Tr. at 144. In 2006, the Employer signed a collective bargaining agreement with the Union. U. Ex. 1. The collective bargaining agreement covers employees employed as "Mixer Men, Repair Men, Grease Men, Welders, Conveyor Men, Belt Men, Dust Men, Barge and Boat Trimmers, Cleaner Men, Fork Lift Operators, Hilo Operators, and all other laborers All loading through Hoppers, Hot Storage Bins or asphalt, manufacturing in Asphalt Plants shall be done by Employees covered by this Agreement." U. Ex. 1 at Article 1A, Section 3. The collective bargaining agreement also provides that all employees covered by the agreement "shall become and remain members of Local 175 as a condition of continued employment not later than thirty-one (31) calendar days following the date of this Agreement or the commencement of their employment by the Employer, whichever is later." Id. at Article 1A, Section 1.

Unit members perform various tasks involved with the process of manufacturing asphalt. The plant is operated by a computer, which is run by a unit member in the control tower. Tr. at 14. The plant has various bins filled with raw materials used to make the asphalt, including sand, stone, and recycled asphalt. The material travels from the bins by conveyor belt to a burner, where the material is heated. The machine adds liquid and mixes the asphalt, which is then loaded into the silos by the machine. Tr. at 16. Customers pick up asphalt from the silos. Tr. at 14. Unit members perform tasks such as filling the bins with the raw materials, cleaning up, maintaining the asphalt plant, and directing traffic in the yard. Tr. at 14-16.

Clemenza testified that as the organizer for the Union, he is at the plant approximately twice a week. He also passes the Employer's facility daily on his way to other work sites. Tr. at 69. Prior to its collective bargaining relationship with the Union, the asphalt plant laborers were represented by Local 1175 of the Laborers' International Union, the Union's predecessor. Tr. at 146, ER. Ex. 3. Clemenza was the former business manager of 1175. Tr. at 118. In connection with 1175, Clemenza represented these employees for the past twenty years and was personally familiar with the workers covered by collective bargaining agreements for that time period. Tr. at 65-66.

On December 24, a pre-election hearing was held in this case. I have taken administrative notice of the transcript from that hearing.⁴ Tr. at 111, 190. At the December hearing, the Petitioner took the position that there were eight individuals in the unit. Clemenza agreed with that representation, but noting that the Union believed that two of those individuals might be supervisors, leaving only six individuals in the unit. Dec. 24 Tr. at 11, 13.

2. Chris, Wakeen, and Domingo

The Union asserts that the Employer omitted the names of individuals named Chris, Wakeen, and Domingo from the Excelsion list. The Union has not identified these individuals by their last names

Evidence

Clemenza testified that he has observed individuals named Domingo and Wakeen perform unit work at the Employer's facility. He testified there was a third individual whose name he could not recall, but thought it might be Chris. Tr. at 73, 78. Clemenza testified that he first saw these individuals at the Employer's facility in or about September, but could not recall whether he saw all three working at that time. Tr. at 116-17. Clemenza testified that in

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I cite to the transcript from the earlier hearing as Dec. 24 Tr.

November and December, he observed Wakeen performing maintenance work, shoveling, sweeping, and making repairs on the plant. Tr. at 78. Clemenza testified summarily that Domingo and Chris did similar work during the same time period. Tr. at 78-79. When asked specifically, Clemenza admitted that he could not remember whether he saw these individuals working at the Employer's facility in December, but thought he possibly saw them working there in early December. Tr. at 117. At another point during his testimony, Clemenza testified that he saw these three individuals at the Employer's facility on at least a few occasions. He later stated that he saw them every time he went to the yard. Tr. at 135-36.

Clemenza admitted that he did not know by whom these three individuals were employed. He stated that they were going to provide the Union with copies of their paystubs, but that he "was under the impression [that] they're working for Tully or whatever companies that were paying them." Tr. at 115. Referring to these individuals, Clemenza testified that he repeatedly joked that the Employer's laborers had their own laborers. Tr. at 71, 141.

Clemenza admitted that the Union never received any dues or benefit contributions on behalf of these three individuals. Tr. at 117-18. Clemenza testified that he personally met with these employees to negotiate their coming into the Union. Clemenza testified that during these meetings, "we were just negotiating them getting, you know, coming into the Union." Tr. at 73. He further explained that during this meeting, he asked whether they had any "interest in joining the Union." Tr. at 136. Clemenza told these employees that they had to sign cards. Tr. at 137, 140.

The Union did not file a grievance or unfair labor practice charge over the Employer's alleged failure to remit benefit fund contributions on their behalf. Tr. at 138-39. The Union never sought the discharge of these three employees for their failure to pay dues as required by

the collective bargaining agreement. U. Ex. 1 at Article 1 Section 1. Clemenza explained that the Union made no demand that the Employer include these employees in the unit because "we were in the middle of negotiating with [these employees] to bring them into the Union." Tr. at 139. Clemenza stated, "We had never presented it to the Employer yet because the men were still being organized." Tr. at 140.

Kenneth Tully testified that Chris, Wakeen, and Domingo are employed by RLB Construction ("RLB"), a contractor the Employer hires on an "as need basis to perform services in and around the plant," including painting, cleaning, and jackhammer work. Tr. at 158-59, 175-76. According to Tully, RLB employees work at the Employer's facility one or two days per week, depending on the need. Tr. at 160-61. They are supervised by the owner of RLB. Tr. at 177. Tully could not recall if all three of these individuals had been present at the Employer's facility in December, explaining that one or two of them might work at the Employer's facility at one time, on a rotating basis. Tr. at 174-75, 204-05. When the Employer requests labor from RLB, the Employer simply requests a number of workers, but does not request workers by name. Tr. at 210. RLB employees do not punch a time clock when they get to the yard, while unit members punch a time clock at the Employer's facility. Tr. at 207-08.

The Employer provided copies of its payroll for the month of December, including for the payroll period ending December 28, 2008, the eligibility period for this election. The names Chris, Wakeen, and Domingo do not appear on these records. Er. Exs. 4-7. In addition, the Employer provided a summary of weekly payments it made to RLB. Er. Ex. 8. Tully testified that these payments were for labor provided by RLB employees. He could not identify which employees the payments listed in the record would include. RLB employees other than Chris, Wakeen, and Domingo have worked at the Employer's facility. Tr. at 202-03, 205-06. Tully

testified that generally, the Employer pays RLB a standard amount every week, but will vary that amount every few weeks to account for any variance in hours. Tr. at 206.

Tully confirmed that the Employer has not made any payments to the Union on behalf of these individuals, either for dues or for benefits. The Union has made no demand that the Employer do so. Tr. at 159-60.

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the witnesses, I generally credit the testimony of Kenneth Tully. He testified in a straightforward, consistent manner about the Employer's relationship with Chris, Wakeen, Domingo, and their employer, RLB. Tully explained the process by which the Employer requests additional labor from RLB and how RLB is paid for that work. In addition, Tully testified about the frequency with which the Employer uses RLB employees. His testimony was supported by documentary evidence, specifically the Employer's payroll records, on which these individuals do not appear, and a record of payments made by the Employer to RLB Construction. Er. Exs. 4-8. Tully also gave examples of the kind of work these three individuals do at the Employer's facility.

I cannot credit Clemenza's testimony that Chris, Wakeen, and Domingo are unit members and should have been included on the Excelsior list. Clemenza, who could not identify these individuals by their full names, admitted that he did not know by whom they are employed, stating that he merely "assumed" they worked for a Tully company. Tr. at 115. Clemenza's testimony regarding how frequently he saw these individuals at the Employer's facility was extremely inconsistent. At times, he testified that he saw these individuals at the facility on at least a few occasions, but at other times he testified that he saw them at the facility every time he went there, about twice a week. Tr. at 116-17, 135-36. Moreover, Clemenza's own actions

illustrate that he knew that these individuals were not in fact unit members. He asked them to sign cards, Tr. at 137, 140, and admitted that he did not demand that the Employer provide contract benefits for these individuals because the Union was still organizing them. Tr. at 140. Prior to the election, Clemenza took the position at a pre-election hearing that the unit consisted of six or eight individuals, not the thirteen individuals the Union now seeks, even though he admitted that he knew of these three individuals by September or October. Tr. at 116-17, Dec. 24 Tr. at 11, 13. Clemenza testified that he repeatedly joked that the Employer's laborers had their own laborers, suggesting that he knew that these individuals were not unit members. Tr. at 71, 141.

Discussion

Generally, to be eligible to vote in a Board election, an employee must be employed in the unit during both the eligibility period and on the date of the election. See Plymouth Towing Company, Inc., 178 NLRB 651 (1969); see also Stockham Fittings, Inc., 222 NLRB 217, fn. 2 (1976); Choc-ola Bottlers, Inc., 192 NLRB 1247 (1971). Based on the record evidence, I find that Chris, Wakeen, and Domingo were not eligible to vote in this election.

The Union has not established that Chris, Wakeen, or Domingo were employed by the Employer at any time, let alone during the pay period for the voting eligibility ending December 28. In fact, Clemenza admitted that he had never seen paystubs for these employees, but assumed that they were "working for Tully or whatever companies that were paying them." Tr. at 115. Further, Clemenza admitted that he could not remember if any of these individuals were working during the month of December, stating that they might have been working the first week of that month. Tr. at 117. Thus, the Union has not been able to establish that Chris, Wakeen, or Domingo were employed by the Employer during the payroll period ending December 28, 2008.

The Employer offered credible testimony of Kenneth Tully that these individuals are not employed by the Employer, but rather are employed by RLB. Tully explained that the Employer hires RLB to provide additional labor as needed, usually on a weekly basis. Tr. at 158-59, 175-76, 210. The Employer remits weekly payments to RLB for the additional labor. Tr. at 210, 216, Er. Ex. 8. Chris, Wakeen, and Domingo do not appear on the Employer's payroll. Er. Exs. 4-7.

Given the lack of evidence that Chris, Wakeen, or Domingo have been employed by the Employer at any time, I find that these individuals were not eligible to vote in the election. The Employer did not engage in objectionable conduct by omitting their names from the Excelsion list.

3. Ray Ortiz

The Union asserts that Ray Ortiz performs unit work and that the Employer improperly omitted his name from the Excelsior list. The Employer maintains that Ortiz does not perform unit work, but rather is a quality control employee who has historically been excluded from the unit. The quality control classification is neither expressly included or excluded in the unit description.

Evidence

Clemenza testified that he became aware of Ortiz in September. Tr. at 88. Clemenza admitted that Ortiz works in the Employer's lab, but states that he has also seen Ortiz making repairs on the plant and shoveling in the yard, which he contends is unit work. Tr. at 75-76. Clemenza was unable to testify about how frequently he observed Ortiz doing this work, stating that it was "not every day," but on "most of the occasions" Clemenza stopped at the Employer's facility in November, early December, and January. Tr. at 134.

Clemenza conceded that the Union has not received dues or fund remittances on behalf of Ortiz. Tr. at 88, 92. Clemenza admitted that he spoke to Ortiz about joining the Union in November. Clemenza asked Ortiz to sign an authorization card, stating: "[Ortiz] wanted to know if the other men would sign, and then I told him if they all sign, then he says he would be interested, you know, in getting into the Union. He had talked about it before. He thought it was a good idea and he wanted the benefits." Tr. at 138.

The Union never filed a grievance with the Employer or an unfair labor practice charge with the Board asserting that Ortiz should be included in the unit and receive contract benefits. Tr. at 139. The Union made no request that Ortiz's employment be terminated for failing to comply with the Union shop requirements contained in the collective bargaining agreement. Tr. at 94, U. Ex. 1 at Article IA, Section 1. Clemenza explained that he did not approach the Employer about Ortiz because he was negotiating with Ortiz about coming into the Union and Ortiz was "being organized." Tr. at 139-40.

Ray Ortiz, Nestor Secaira, and Tully testified about Ortiz's duties. Ortiz and Tully testified that Ortiz has worked for the Employer for about nine years performing quality control and quality assurance testing. Tr. at 154, 213. Ortiz works in a lab set up in a trailer that is located next to the asphalt plant. Tr. at 154. All three witnesses described how Ortiz takes samples from customers' trucks and tests the sample to check the moisture. Tr. at 34, 155, 214, 216-17. Ortiz will then communicate with the employees in the control tower to adjust the mixture for the asphalt according to his findings. Tr. at 34, 155. He is the only employee who performs this work for the Employer. Tr. at 216. Ortiz is certified by New York State to conduct this testing. Tr. at 214-15, 155. Tully confirmed that no employee on the Excelsior list performs such testing or maintains such certification. Tr. at 155.

When the plant is not in operation, Ortiz will perform some light duty for the Employer. Tully explained that Ortiz's first priority would be to clean the lab. Tr. at 173. He may also help out in the yard doing some painting. Id. Tully testified that Ortiz does not generally perform maintenance on the asphalt plant itself. Tr. at 174. Ortiz testified that he does not perform any work other than the quality control testing for the Employer. Tr. at 215, 218.

Ortiz testified that he has never been represented by the Union or its predecessor. Tr. at 215. Tully confirmed that the Employer never paid any Union dues or made fund remittances for Ortiz to either the Union or 1175. Tr. at 157. The Union never made a demand that the Employer remit fund contributions to the Union and never filed a grievance over the Employer's failure to do so. Tr. at 157.

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the witnesses, I generally credit the testimony of Ortiz, Secaira, and Tully. These witnesses all testified in a straightforward manner about the work Ortiz performs. Ortiz and Tully explained how Ortiz collects and tests samples. Tr. at 214, 216-17, 155. Secaira confirmed that he has seen Ortiz collecting samples and described his own interaction with Ortiz based on the moisture of the asphalt. Tr. at 34. Ortiz and Tully both testified that Ortiz has historically been excluded from the unit. Tr. at 215, 157. The testimony of these three witnesses is consistent.

As for the testimony of Clemenza, I cannot credit his assertions that he has observed Ortiz performing unit work with regularity. Clemenza was not able to testify with specificity about dates on which he observed Ortiz performing unit work or about the work Ortiz was allegedly doing. In addition, Clemenza's assertion that Ortiz is a unit member is inconsistent with his testimony that the Union has never sought his inclusion in the unit, although Clemenza

has been aware of Ortiz's employment since September. Tr. at 88, 94, 139. Significantly, as with Chris, Wakeen, and Domingo, Clemenza testified that he made no demand on the Employer to include Ortiz in the unit because he was in the process of organizing Ortiz. Tr. at 140. Again, I note that prior to the election, the Union took the position that there were only six or eight individuals in the unit. Dec. 24 Tr. at 11, 13.

Discussion

Based on the record evidence, I find that Ray Ortiz was not eligible to vote in this election.

The record established that Ortiz does not perform unit work, but rather works as a quality control employee, testing the Employer's asphalt to make sure it has the requisite amount of moisture, as Ortiz, Tully, and Secaira all described. He works in a lab, set up in a trailer next to the asphalt plant, not in the yard with the unit members. Tr. at 154. Ortiz maintains a certification from New York State to perform this testing, a certification that no unit member maintains. Tr. at 156. Ortiz testified that he does not perform other work for the Employer. Tr. at 215, 218. The only evidence in the record that Ortiz performs laborer duties is the testimony of Clemenza, which I have discredited for the reasons explained above.

Significantly, Ortiz's position has historically been excluded from the unit. Ortiz has worked for the Employer in his current position for approximately nine years. Tr. at 213, 154. It is undisputed that Ortiz has never been represented by the Union or by its predecessor. Clemenza concedes that the Union has never received dues or fund remittances on Ortiz's behalf and has never made any demand that the Employer include him in the unit or discharge him for failure to remit dues to the Union. Tr. at 88, 92, 94. In fact, Clemenza admitted that he was

"negotiating" with Ortiz about coming into the Union, asked him to sign a union authorization card in November, and states that the Union was "organizing" Ortiz at that time. Tr. at 139-40.

The Board is reluctant to disturb historical bargaining units and the party seeking to show that a long standing unit is no longer appropriate bears a heavy evidentiary burden. Ready Mix USA Inc. 340 NLRB 946, 947 (2003). In Canal Carting Inc., 339 NLRB 969 (2003), a single employer had historically maintained two distinct bargaining units of drivers, helpers, and other employees represented by two different unions. When one union sought to represent all the drivers, helpers, mechanics, and certain other employees, the Board found that the employer's bargaining history outweighed the community of interest factors absent any compelling reason to disturb the employer's long standing bargaining history. See also Children's Hospital of San Francisco, 312 NLRB 920 (1993); Buffalo Broadcasting Co., 242 NLRB 1105 (1979); Great Atlantic & Pacific Tea Co., 153 NLRB 1549 (1965). The Union has not demonstrated that there are any compelling reasons to disturb the bargaining history in this case.

Based on the evidence that Ortiz does not perform unit work and has historically been excluded from the unit, I find that Ortiz was not eligible to vote in the election. The Employer did not engage in objectionable conduct by omitting his name from the Excelsior list.

4. Phillippe Garcia

The Union asserts that Phillippe Garcia performs unit work and that the Employer improperly omitted his name from the Excelsior list. The Employer maintains that Garcia does not perform unit work, but rather is a recycling employee, a position which has historically been excluded from the unit. The recycling position is neither expressly included or excluded in the unit description.

Evidence

Clemenza testified that he has been aware of Garcia's employment since September or October. Tr. at 93. Since that time, Clemenza testified that he has seen Garcia working on the recycling machine, shoveling spillage under the asphalt manufacturing machine, greasing, and making repairs to the asphalt plant, describing this work as "work that the plant workers would do." Tr. at 71-72. When asked when he observed Garcia performing work on the asphalt plant, Clemenza could not recall the dates on which he witnessed this, or any other accompanying details. Tr. at 97-98.

Clemenza admitted that Garcia has never paid dues to the Union. Tr. at 92. Clemenza stated that he did not personally speak to Garcia about joining the Union, but he asked an interpreter to speak to Garcia. Tr. at 138.

The Union never demanded that the Employer make any fund contributions on behalf of Garcia. Tr. at 93. The Union never filed a grievance or an unfair labor practice case regarding the Employer's failure to include Garcia in the unit or sought Garcia's termination for his failure to comply with the shop requirements in the collective bargaining agreement. Tr. at 94 139, U. Ex. 1 at Article IA, Section 1. Clemenza again explained that the Union did not make any demand that the Employer include Garcia in the unit prior to the election because the Union was in the process of organizing Garcia. Tr. at 140.

Garcia and Tully testified that Garcia operates a payloader and the recycling machine. Tr. at 222-23, 151-52. The recycling machine is separate from the asphalt plant. Garcia testified that he does not work on the plant itself. Tr. at 223, 226. Garcia and Tully testified that Garcia performs maintenance on the recycling machine, but not on the asphalt plant. Tr. at 227-28, 171-72.

Garcia testified that he has never paid dues to the Union. Tr. at 237. Tully confirmed that the Employer has made no dues or fund payments to the Union on Garcia's behalf. Tr. at 152-53.

Tully also testified that the Employer has historically employed a recycling employee, and that this position has never been included in the unit. Before Garcia was hired by the Employer, Edwin Ponce operated the recycling machine. Tr. at 146. Ponce was not represented by Local 1175. Tr. at 146. When the Union first represented the unit, Ponce was employed as the recycler and was not included in the unit at that point. Tr. at 149. Later, Ponce's job changed and he began loading bins of raw material on the asphalt plant. At that time, the Employer included Ponce in the unit. Tr. at 148-49, 166, 204.

Turning to credibility, after observing the demeanor and listening carefully to the testimony of the witnesses, I generally credit the testimony of Garcia and Tully. Both witnesses testified that Garcia operates a recycling machine which is separate from the asphalt manufacturing plant. Their testimony was consistent and straightforward. I also credit Tully's testimony about Ponce, the employee who performed recycling work prior to Garcia. Tully's testimony about Ponce's position and union membership was straightforward and provided a timeframe regarding Ponce's duties prior to and during his union membership. Finally, I note that Tully's testimony regarding Ponce was completely unrebutted by the Union.

I do not credit Clemenza's testimony that he has seen Garcia performing unit work. Again, Clemenza's recall of these events was poor. He could not provide any dates or details about these alleged instances. Tr. at 97-98. His assertion that Garcia does unit work is also inconsistent with his own testimony that, although he knew of Garcia's employment with the Employer in September, the Union never made a demand for Garcia's inclusion in the Union

because the Union was in the process of organizing Garcia and the other individuals at issue in this case. Tr. at 93, 140. I again note that Clemenza's assertion that Garcia is a unit member is inconsistent with the Union's position at the pre-election hearing in this case. Dec. 24 Tr. at 11, 13.

Discussion

Based on the record evidence, I find that Garcia was not eligible to vote in this election.

The Union argues that Garcia is clearly an asphalt laborer and that his work is indistinguishable from the work of an unit member working on the plant itself. It is undisputed that Garcia loads used asphalt into a recycling machine with a payloader, which prepares the material for use in the asphalt plant. The Union points to its collective bargaining agreement which describes covered work as "all loading through hoppers, hot storage bins or asphalt, manufacturing in asphalt plants shall be done by Employees covered by this Agreement." U. Ex. 1 at Article 1A, Section 3. Garcia's duties are similar to than of a unit laborer, but given the historical composition of the unit, Garcia was not eligible to vote in this election.

As with Ortiz, Garcia's position has been historically excluded from the unit. Tully explained that prior to Garcia's employment with the Employer, the Employer employed Edwin Ponce in the recycling position. When Ponce was in this position, he was not represented by the Union or its predecessor, although he became a unit member when he began working on the asphalt plant. As explained above, the Board will disturb historical bargaining units in very rare instances as long as the unit does not violate Board policy. See Canal Carting Inc., 339 NLRB 969 (2003); Children's Hospital of San Francisco, 312 NLRB 920 (1993); Buffalo Broadcasting Co., 242 NLRB 1105 (1979); Great Atlantic & Pacific Tea Co., 153 NLRB 1549 (1965), supra. In Canal Carting, the Board made clear that historical bargaining unit may trump community of

in this case. In fact, the Union concedes that it was organizing Garcia in late 2008, demonstrating that the Union acknowledged that Garcia could not simply be considered a unit member based on his duties.

Even if it is arguable whether Garcia is a unit member based on his duties or is not a unit member due to the historical exclusion of the recycling position from the unit, the Employer had a good faith reason for omitting Garcia's name from the Excelsior list in this case. As the Board observed in Woodman's Food Markets, Inc., 332 NLRB 503, supra, factors other than the omission rate may be relevant to an Excelsior list objection, including the Employer's explanation for the omissions. Woodman's, 332 NLRB at 504; see also North Macon Health Care Facility, 315 NLRB 359, supra, and Bear Truss, Inc., 325 NLRB 1162 (1998) (in which the Board considered whether there was evidence of bad faith on the Employer's part when providing the Excelsior list).

In this case, the Employer had a good faith basis on which to exclude Garcia, specifically that the recycling position had been historically excluded from the unit, ⁵ as discussed above. It is undisputed Garcia has never received contract benefits, and the Union has never requested that the Employer provide such benefits to him. Although the Union argues that Garcia performs unit work, Clemenza admitted that he was organizing Garcia and other employees in late 2008. It is significant also that this was a decertification case, and it was reasonable for the Employer to omit names of employees who have never been included in the unit. Here, the Employer

Based on my finding that Ortiz and Garcia are not unit members, there will be at least two employees who are not in the unit. Thus, excluding Garcia from the unit will not implicate the Board's policy of avoiding the creation of one-person units. See Roman Catholic Orphan Asylum d/b/a Mount St. Joseph's Home for Girls, 229 NLRB 251 (1977).

reasonably included the names of the employees who have been represented by the Union and were eligible to vote on whether they wished to maintain that representation.

The record evidences establishes that Garcia was not eligible to vote in this election and that the Employer did not engage in objectionable conduct by omitting his name from the Excelsior list.

C. Conclusion

Based on my finding that Ray Ortiz, Phillippe Garcia, Chris, Wakeen, and Domingo are not eligible to vote in this election, the Employer did not engage in objectionable conduct by omitting their names from the Excelsior list. The evidence established that Chris, Wakeen, and Domingo are not employed by the Employer and that Ortiz and Garcia have historically been excluded from the unit. There is no evidence that the Excelsior list provided by the Employer prior to the election omitted the names of any eligible voters. I therefore recommend overruling the Union's objection.

SUMMARY AND RECOMMENDATIONS

Based on my recommendation to overrule the Union's objection, I further recommend issuing a certification of results Willets Point Asphalt Corporation, 29-RD-1124.

RIGHT TO FILE EXCEPTIONS

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, any party, within fourteen (14) days from the date of the issuance of this Report, may file with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street,

N.W., Washington, D.C. 20570-0001, an original and eight (8) copies of exceptions to such Report, with supporting brief if desired. A copy of such exceptions together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Board. Within seven (7) days from the last date on which exceptions may be filed, a party opposing the exceptions may file an original and eight (8) copies of an answering brief with the Board. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Board. If no exceptions are filed to such Report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. Exceptions must be received by the Board in Washington D.C. on or before April 15, 2009.

Signed at Brooklyn, New York, on this 1st day of April, 2009.

"/s/{Rachel Mead Zweighaft]